ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Test for Relevant Evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Comment to 2012 Amendment

The language of Rule 401 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Civil Cases

401.civ.010 For evidence to be relevant, it must satisfy two requirements: First, the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

Salt River Project v. Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 10–12, 20–22 (2008) (because tax valuation is based on current use, and condemnation valuation is based on highest and best use, and because current use may or may not be highest and best use, tax valuation is generally inadmissible in determining condemnation valuation, but may be relevant in certain situations; thus whether to admit such evidence is within trial court's discretion).

Shotwell v. Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 4–36 (2004) (court rejected position that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, and held instead that admissibility of letter is controlled by Arizona Rules of Evidence; court stated "contents of Determination is certainly probative of matters at issue in the case").

Oliver v. Henry, 227 Ariz. 514, 260 P.3d 314, ¶¶ 2–17 (Ct. App. 2011) (plaintiff purchased vehicle new in October 2008 for $23,296; in December 2008, vehicle was involved in collision; court noted measure of damages to personal property that is not destroyed is difference in value immediately before and immediately after injury; for vehicle that was repaired, measure of damages was cost of repair ($15,535) plus difference in value of vehicle before and after collision ($8,975)).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 1, 14, 23–31 (Ct. App. 2011) (homeowners sued Lennar for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court held insurer that seeks judicial interpretation of disputed policy term may not ignore claims-handling responsibilities while declaratory judgment action proceeds, and it was jury question whether insurance companies acted in good faith).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 18–22 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court noted insured suing for bad faith based on denial of coverage must prove not only that insurer lacked objectively reasonable basis for denying claim, but also insured knew or was conscious of fact it lacked reasonable basis for claim; court held trial court's initial determination that damages Lennar sought did not relate to "occurrence" within meaning of policy was relevant, as was court of appeals' contrary conclusion, and evidence of how these insurance companies, other insurance companies, and other courts have interpreted this policy language would be relevant, and this was question for jurors to resolve).

Wendland v. Adobeair, Inc., 223 Ariz. 199, 221 P.3d 390, ¶¶ 12–26 (Ct. App. 2009) (Partners leased property containing three buildings to Adobeair (defendant); defendant relocated its manufacturing business and removed press machines from building 2, leaving 12 foot deep pits that had been under press machines; defendant agreed to fill pits to return floor to flat surface before returning building to Partners; Partners hired general contractor to remodel building, but told general contractor not to work in building 2 until pits were filled in; general contractor asked plaintiff to give bid for part of remodeling project; plaintiff entered building 2, and because of poor lighting conditions, fell into pit; defendant moved *in limine* to preclude plaintiff's expert from giving testimony on standard of care because that opinion was based on OSHA standards; court agreed that defendant was not bound by OSHA regulations, but held jurors could consider OSHA standards along with other relevant evidence to determine whether defendant had notice of unreasonably dangerous condition and whether it failed to use reasonable care to provide warnings or adequate safeguards, thus trial court did not abuse discretion in allowing defendant's expert to testify about OSHA standards).

Bogard v. Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court followed rule that EEOC determination letter is not automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead trial court has discretion to admit letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

Ritchie v. Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical

spinal cord injury"; prior to his death, plaintiff filed medical malpractice complaint against various doctors; after trial, jurors returned verdict of $5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held that defendant owed duty of reasonable care to plaintiff; defendant contended that trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

Brethauer v. General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and bounced through ditch; side and rear windows shattered and plaintiff was ejected out rear window; plaintiff asserted he was wearing seat belt; plaintiff contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks ("C/K trucks") because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted that plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

Warner v. Southwest Desert Images, 218 Ariz. 121, 180 P.3d 986, ¶¶ 33–37 (Ct. App. 2008) (plaintiff sued defendant weed control company after its herbicide spray entered building through air conditioning system; trial court granted defendant's motion to preclude plaintiff from introducing evidence of workers' compensation benefits she had received; court held evidence of workers' compensation benefits is generally inadmissible because it is irrelevant to issue of plaintiff's damages, and thus affirmed trial court's ruling).

Belliard v. Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (even though defendant conceded negligence and liability, because plaintiff was seeking punitive damages, evidence of defendant's alcohol consumption prior to collision was of consequence to determination whether defendant consciously pursued course conduct knowing it created substantial risk of significant harm to another, and thus was material).

Miller v. Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 3–9 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that amount of settlement did not relate to fact that was of consequence to determination of the action (whether defendant was negligent in present action), thus held trial court erred in ordering disclosure of settlement amounts).

Acuna v. Kroack, 212 Ariz. 104, 128 P.3d 221, ¶¶ 14–20 (Ct. App. 2006) (vehicle collided with plaintiff's vehicle; after collision, defendant-husband appeared to be intoxicated, and left scene before police arrived; defendant-wife told police she was driving vehicle, and made same statement several days after collision and in deposition; defendant-husband later acknowledged he was driving vehicle; plaintiff brought action against both defendants for negligence and against defendant-wife for negligently entrusting vehicle to husband; court held that evidence of defendant-husband's possible intoxication and leaving scene of collision, and defendant-wife's initially claiming she was driving vehicle, related to fact that was of consequence to determination of action, i.e., whether defendant-husband was negligent in driving and whether defendant-wife negligently entrusted vehicle to husband).

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 46–53 (Ct. App. 2004) (plaintiffs sued Allstate for abuse of process based on how Allstate handled their minor impact soft tissue (MIST) claims, and sought to introduce evidence of how Allstate handled other MIST claims; trial court precluded evidence under Rule 403; court agreed with plaintiffs that other act evidence was both "relevant and probative" of issues in the case, and although it stated that reasonable minds might disagree with trial court's assessment that probative value of other act evidence was limited, it stated it could not conclude that trial court abused its discretion in light of argument given on both sides of question).

Jimenez v. Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶ 15 (Ct. App. 2003) (plaintiff offered photographs showing various hazards near entrance to defendant's store, contending these refuted defendant's claim of "meticulously well-kept entrance"; because photographs were taken some time after injury and did not depict condition of entrance at time of injury, relevance was questionable).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; court held radiologist's negligence was of consequence to the determination of the action and thus was relevant (materiality)).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 6–7 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park, which was not scalable and was cordoned off; because ADOT memorandum related to warning signs at Painted Cliffs rest area and expressed no statewide policy, and because Painted Cliffs wall consisted of blocks forming steps that enable people to scale it, memorandum was not of consequence to determination whether state was negligent in maintaining Patagonia Lake area), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

S. Dev. Co. v. Pima Capital Mgmt Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 32–35 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; trial court granted plaintiff's motion *in limine* to preclude evidence that plaintiff had received settlement proceeds from class-action lawsuit against manufacturer of pipe; court held measure of damages was difference between what plaintiff paid for building and what building was worth at time of sale, thus amount of money subsequently received was not of consequence to determination of action and thus was not relevant (materiality)).

Yauch v. Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 19–24 (Ct. App. 2000) (plaintiff injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; court held evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program was relevant to issue of mitigation of damages, and further held that Arizona's "sheltered employment" doctrine did not apply in FELA cases).

Yauch v. Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 31–37 (Ct. App. 2000) (plaintiff injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; because trial court did not allow mitigation of damages defense, plaintiff's emotional distress 2 years after accident did not relate to any issue being litigated, thus evidence of defendant's conduct 2 years after accident and whether that conduct caused plaintiff's emotional distress did not relate to any issue being litigated).

Elia v. Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 35–36 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceedings, they might be negligent, which would reduce defendant's share of the liability).

State v. Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶¶ 35–37 (Ct. App. 1998) (in severance damages action resulting from state's building freeway next to defendant's property, expert testimony about noise levels produced by persons driving related to issue that was of consequence to determination of action).

Conant v. Whitney, 190 Ariz. 290, 947 P.2d 864 (Ct. App. 1997) (plaintiffs were injured when they ran into bull owned by defendant; evidence that Forest Service land on which defendant had grazing permit did not permit bulls was relevant to plaintiffs' claim that duty to keep bulls out of area imposed no more of burden than Forest Service already imposed, that defendant knew keeping bull out of area was necessary for public safety, to rebut inference that Forest Service was at fault for not prohibiting bulls in this area, and to define defendant's contractual undertakings and responsibilities in relation to that of the Forest Service).

Hutcherson v. City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (victim in wrongful death action was player for Phoenix Cardinals; because evidence showed that victim intended to support mother, his future income was relevant to mother's damages).

401.civ.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

Salt River Project v. Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 10–12, 20–22 (2008) (because tax valuation is based on current use, and condemnation valuation is based on highest and best use, and because current use may or may not be highest and best use, tax valuation is generally inadmissible in determining condemnation valuation, but may be relevant in certain situations; thus whether to admit such evidence is within discretion of trial court).

Shotwell v. Dohahoe, 207 Ariz. 287, 85 P.3d 1045, ¶¶ 4–36 (2004) (court rejected position that EEOC determination letter is automatically admissible as evidence in Title VII employment discrimination lawsuit, and held instead that admissibility of letter is controlled by Arizona Rules of Evidence; court stated "contents of Determination is certainly probative of matters at issue in the case").

Oliver v. Henry, 227 Ariz. 514, 260 P.3d 314, ¶¶ 2–17 (Ct. App. 2011) (plaintiff purchased vehicle new in 10/08 for $23,296; in 12/08, vehicle was involved in collision; court noted measure of damages to personal property that is not destroyed is difference in value immediately before and immediately after injury; for vehicle that was repaired, measure of damages was cost of repair ($15,535) plus difference in value of vehicle before and after collision ($8,975)).

Lennar Corp. v. Transamerica Ins. Co., 227 Ariz. 238, 256 P.3d 635, ¶¶ 18–22 (Ct. App. 2011) (Lennar built homes; homeowners sued for construction defects; Lennar tendered claims to insurance companies; insurance companies brought declaratory judgment action; trial court granted summary judgment in favor of insurance companies concluding construction defects would not be considered "occurrence" within meaning of policies; court of appeals reversed, holding allegations of construction defects were sufficient to allege "occurrence" under policies; insurance companies then moved for summary judgment on Lennar's bad faith claim, contending trial court's ruling in their favor on "occurrence" issue established insurance companies had reasonable basis for denying coverage; court noted insured suing for bad faith based on denial of coverage must prove not only that insurer lacked objectively reasonable basis for defying claim, but also insured knew or was conscious of fact it lacked reasonable basis for claim; court held trial court's initial determination that damages Lennar sought did not relate to "occurrence" within meaning of policy was relevant, as was court of appeals' contrary conclusion, and evidence of how these insurance companies, other insurance companies, and other courts have interpreted this policy language would be relevant, and this was question for jurors to resolve).

Wendland v. Adobeair, Inc., 223 Ariz. 199, 221 P.3d 390, ¶¶ 12–26 (Ct. App. 2009) (Partners leased property containing three buildings to Adobeair (defendant); defendant relocated its manufacturing business and removed press machines from building 2, leaving 12 foot deep pits that had been under press machines; defendant agreed to fill pits to return floor to flat surface before returning building to Partners; Partners hired general contractor to remodel building, but told general contractor not to work in building 2 until pits were filled in; general contractor asked plaintiff to give bid for part of remodeling project; plaintiff entered building 2, and because of poor lighting conditions, fell into pit; defendant moved *in limine* to preclude plaintiff's expert from giving testimony on standard of care because that opinion was based on OSHA standards; court agreed that defendant was not bound by OSHA regulations, but held jurors could consider OSHA standards along with other relevant evidence to determine whether defendant had notice of unreasonably dangerous condition and whether it failed to use reasonable care to provide warnings or adequate safeguards, thus trial court did not abuse discretion in allowing defendant's expert to testify about OSHA standards).

In re MH 2008-002596, 223 Ariz. 32, 219 P.3d 242, ¶¶ 12–16 (Ct. App. 2009) (appellant sought relief from order for involuntary mental health treatment; statute required testimony of two or more witnesses acquainted with patient; appellant contended one witness did not qualify as acquaintance witness because her contact with him was limited to one 15 minute telephone conversation; court held that this telephone conversation gave witness personal knowledge;

court noted that appellant had told witness that he had overdosed on medications and that he would refuse help by lying to first responders; court held this information was relevant).

Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810, ¶¶ 19–21 (Ct. App. 2009) (plaintiffs were bail enforcement agents (bounty hunters); on 9/11/99, they flew from Baltimore to Phoenix; before trip, they called Southwest Airlines (SWA) to obtain instructions on how to transport handguns lawfully on airplane; plaintiffs followed those instructions, but were arrested in Phoenix because they were not law enforcement officers; plaintiffs sued SWA claiming that SWA was negligent in actions that led to plaintiffs' arrest; jurors returned verdicts of $500,000 each in compensatory damages and $4 million each in punitive damages; SWA contended that evidence that plaintiffs (1) failed to obtain Maryland-issued concealed weapons permits and (2) failed to work with local bail agent in apprehending fugitive in Tucson after they were released from custody was relevant on issue of plaintiffs' comparative fault for failing to investigate adequately how to transport weapons legally on airplane; court held that neither (1) whether plaintiffs violated Maryland law while going to Baltimore airport nor (2) whether plaintiffs failed to comply with local laws while apprehending fugitive in Tucson made it more or less probable that plaintiffs exercised reasonable care in investigating how to travel legally on airplane with weapons, thus trial court correctly precluded this evidence).

Bogard v. Cannon & Wendt Elec. Co., 221 Ariz. 325, 212 P.3d 17, ¶¶ 32–37 (Ct. App. 2009) (court followed rule that EEOC determination letter is not automatically admissible as evidence in Title VII employment discrimination lawsuit, but instead trial court has discretion to admit letter under Arizona Rules of Evidence; court held trial court did not abuse discretion in determining EEOC letter was relevant and that its probative value was not substantially outweighed by danger of unfair prejudice).

Ritchie v. Krasner, 221 Ariz. 288, 211 P.3d 1272, ¶¶ 12–22 (Ct App. 2009) (plaintiff injured back at work; worker's compensation carrier retained defendant to perform independent medical examination; prior to examination, plaintiff signed agreement stating that no doctor-patient relationship existed between plaintiff and defendant; defendant opined that plaintiff's condition was stable and that he could go back to work; plaintiff's condition continued to deteriorate; he was later examined by AHCCCS doctor, who diagnosed cervical spinal cord compression and recommended surgery; surgery halted further deterioration of plaintiff's spinal cord, but condition prior to surgery caused part of plaintiff's spinal cord to die; plaintiff developed condition called "central pain syndrome," which caused constant pain, so AHCCCS doctor prescribed Oxycontin and Oxycodone; plaintiff subsequently died of accidental overdose, characterized as "synergistic effects of the various medications he was taking for his cervical spinal cord injury"; prior to his death, plaintiff filed medical malpractice complaint against various doctors; after trial, jurors returned verdict of $5 million and found defendant 28.5% at fault; court concluded that, because defendant was hired to determine extent of plaintiff's work-related injuries and make treatment recommendations, he assumed duty to conform to legal standards of reasonable conduct in light of apparent risk, thus trial court correctly held that defendant owed duty of reasonable care to plaintiff; defendant contended that trial court erred in precluding admission of limited liability agreement; court held that, because defendant's duty to plaintiff did not depend on doctor-patient relationship, agreement that there was no doctor-patient relationship was not relevant, thus trial court was correct in precluding its admission).

Brethauer v. General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 15–16 (Ct. App. 2009) (plaintiff's 1998 pick-up truck went off road and plaintiff was ejected; plaintiff asserted he was wearing seat belt and contended seat belt buckle was defective and unlatched improperly; plaintiff contended trial court erred by granting GM's motion in limine to preclude evidence that GM recalled certain 1994–95 C/K extended cab pick-up trucks ("C/K trucks") because, if both lap and shoulder belt energy management loops in those vehicles released at same time in frontal collision, resulting inertial forces and loading of belts could cause buckle to unlatch; although plaintiff drove different 1998-model pick-up truck, both models used identical "JDC buckle"; plaintiff claimed recall evidence was relevant to show both that JDC buckle had potential to release due to inertial forces and that GM knew about this defect; court held that fact "of consequence" in this case was whether inertial forces acting on plaintiff's truck as it bounced through rough terrain caused JDC buckle to unlatch prior to any impact; court noted that plaintiff's truck did not have same fabric belt system that GM replaced in C/K trucks, that plaintiff was not involved in frontal collision, and no evidence showed that, absent defective fabric belts in C/K trucks, JDC buckles could have unlatched prior to collision, thus recall of C/K trucks to replace belting system in order to avoid unlatching in frontal collisions did not have tendency to make it more probable that JDC buckle unlatched during plaintiff's accident).

Belliard v. Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (even though defendant conceded negligence and liability, because plaintiff was seeking punitive damages, evidence of defendant's alcohol consumption prior to collision showed it was more probable that defendant consciously pursued course conduct knowing it created substantial risk of significant harm to another, and thus was relevant).

Felder v. Physiotherapy Assoc., 215 Ariz. 154, 158 P.3d 877, ¶¶ 56–62 (Ct. App. 2007) (plaintiff was baseball player who had been on major team's 40-man roster repeatedly from 1994 until March 1997, when he was removed from 40-man roster to have elbow surgery; in spring 1998, he injured his eye, which ended his baseball career; plaintiff sued for lost earnings and introduced opinion testimony based on what he could have earned as major league player; defendant sought to introduce data showing that, of the players removed from 40-man roster, only 21.3% advanced to major leagues, and only 3.4% remained in major leagues for more than 3 years; because 63% of players in data were pitchers and plaintiff was outfielder, trial court did not abuse discretion in precluding data as not relevant).

Miller v. Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 3–9 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that amount of settlement did not make fact that was of consequence to determination of the action (whether defendant was negligent in present action) any more probable, thus held trial court erred in ordering disclosure of settlement amounts).

Acuna v. Kroack, 212 Ariz. 104, 128 P.3d 221, ¶¶ 21–35 (Ct. App. 2006) (vehicle collided with plaintiff's vehicle; after collision, defendant-husband appeared to be intoxicated, and left scene before police arrived; defendant-husband later acknowledged he was driving vehicle; plaintiff brought action against both defendants for negligence and against defendant-wife for negligently entrusting vehicle to husband; court held that, because there was no evidence defendant-wife knew or should have known of husband's alleged incompetence to drive when she permitted him to do so, there was not sufficient evidence to support jurors' verdict that defendant-wife was liable for 30 percent of damages).

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 46–53 (Ct. App. 2004) (plaintiffs sued Allstate for abuse of process based on how Allstate handled their minor impact soft tissue (MIST) claims, and sought to introduce evidence of how Allstate handled other MIST claims; trial court precluded evidence under Rule 403; court agreed with plaintiffs that other act evidence was both "relevant and probative" of issues in the case, and although it stated that reasonable minds might disagree with trial court's assessment that probative value of other act evidence was limited, it stated it could not conclude that trial court abused its discretion in light of argument given on both sides of question).

Jimenez v. Wal-Mart Stores, Inc., 206 Ariz. 424, 79 P.3d 673, ¶ 15 (Ct. App. 2003) (plaintiff offered photographs showing various hazards near entrance to defendant's store, contending these refuted defendant's claim of "meticulously well-kept entrance"; because photographs were taken some time after injury and did not depict condition of entrance at time of injury, relevance was questionable).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; because plaintiff's trial strategy was to minimize radiologist's fault in order to place more blame on TMC/HSA, plaintiff's factual allegations contained in complaint delineating radiologist's negligence made this fact of consequence more or less probable and thus were relevant (relevance)).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 6–7 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park, which was not scalable and was cordoned off; because ADOT memorandum related to warning signs at Painted Cliffs rest area and expressed no statewide policy, and because Painted Cliffs wall consisted of blocks forming steps that enable people to scale it, memorandum did not make state's negligence more or less probable), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).

S. Dev. Co. v. Pima Capital Mgmt Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 32–35 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; trial court granted plaintiff's motion *in limine* to preclude evidence that plaintiff had received settlement proceeds from class-action lawsuit against manufacturer of pipe; court held measure of damages was difference between what plaintiff paid for building and what building was worth at time of sale, thus amount of money subsequently received did not make any fact of consequence more or less probable and thus was not relevant (relevance)).

Yauch v. Southern Pac. Transp., 198 Ariz. 394, 10 P.3d 1181, ¶¶ 12–18 (Ct. App. 2000) (plaintiff worked as engineer and injured his back while working, and brought Federal Employer's Liability Act claim against defendant railroad; court held evidence of defendant's Disability Management and Internal Placement Program and plaintiff's failure to take advantage of that program was relevant to issue of mitigation of damages and thus amount of damages, held that Arizona's "sheltered employment" doctrine did not apply in FELA cases, and further held that, even if "sheltered employment" doctrine did apply, defendant's program was not "sheltered employment").

Brown v. U.S.F. & G., 194 Ariz. 85, 977 P.2d 807, ¶¶ 23–27 (Ct. App. 1998) (fire that destroyed plaintiff's house was accelerated with acetone; evidence that neighbor had acetone on his property more than year after fire was too remote to be relevant).

Elia v. Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 35–36 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceedings, they might be negligent, which would reduce defendant's share of the liability).

State v. Wells Fargo Bank, 194 Ariz. 126, 978 P.2d 103, ¶¶ 35–37 (Ct. App. 1998) (in severance damages action resulting from state's building freeway next to defendant's property, expert testimony about noise levels produced by persons driving 10 mph over speed limit made issue that was of consequence to determination of action (noise level) more or less probable, and question whether people actually drove 10 mph over speed limit went to weight rather than admissibility of evidence).

Conant v. Whitney, 190 Ariz. 290, 947 P.2d 864 (Ct. App. 1997) (plaintiffs were injured when they ran into bull owned by defendant; evidence that Forest Service land on which defendant had grazing permit did not permit bulls was relevant to plaintiffs' claim that duty to keep bulls out of area imposed no greater burden than Forest Service already imposed, that defendant knew keeping bull out of area was necessary for public safety, to rebut inference that Forest Service was at fault for not prohibiting bulls in this area, and to define defendant's contractual undertakings and responsibilities in relation to that of Forest Service).

Hutcherson v. City of Phoenix, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (plaintiff claimed "911" operator was negligent because, when victim called to report person was threatening her, operator did not ask about other threats and assign call higher priority; evidence of prior threats and reports of these threats to police was therefore relevant).

401.civ.021 Under former evidence theory, evidence was material if it addressed an issue in the case, and was relevant if it tended to establish the proposition for which it was offered; these two concepts are now covered by relevancy under the modern rules of evidence.

Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987) (court disagreed with conclusion of court of appeals that testimony was erroneously admitted because it was irrelevant, and noted in footnote that modern rules of evidence capture concepts of relevancy and materiality under term "relevance").

401.civ.030 If evidence does not tend to make the existence of any fact of consequence more or less probable, it is not relevant and therefore is not admissible.

Kimu P. v. Arizona D.E.S., 218 Ariz. 39, 178 P.3d 511, ¶¶ 9–12 (Ct. App. 2008) (in proceeding to terminate parental rights to children C.P. and Z.P., court held that evidence of how parents treated I.P., who was born after commencement of termination proceedings for C.P. and Z.P., was not relevant to question whether termination of parental rights to C.P. and Z.P. would be in their best interests).

Moran v. Moran, 188 Ariz. 139, 933 P.2d 1207 (Ct. App. 1996) (parties entered into "marriage contract" that provided it was irrevocable and based on "the Divine Law of Yahweh, as revealed in Holy Scripture" and stated it was "not subject to any statute, rule, regulation, or policy of man, in any jurisdiction whatsoever, if said statute, rule, regulation, or policy is contrary to the Principles of Divine Law"; because issue was whether parties' failure to obtain marriage license invalidated their purported marriage, videotape of what happened at their ceremony was not relevant).

401.civ.050 Arizona law makes no distinction between direct and circumstantial evidence.

Thompson v. Better-Built Alum. Prods., 171 Ariz. 550, 557–59, 832 P.2d 203, 210–12 (1992) (because plaintiff presented sufficient circumstantial evidence to establish that defendant was motivated by evil mind, trial court erred in granting defendant's motion for directed verdict).

State ex rel. Fox v. New Phoenix Auto Auc., 185 Ariz. 302, 306, 916 P.2d 492, 496 (Ct. App. 1996) (although defendant did not have any official records showing that vehicles had been inspected for emissions, defendant presented affidavits, internal records, and monthly fleet inspection summaries, and although this was only circumstantial evidence of inspections, the fact that it was circumstantial evidence did not diminish its probative value, so trial court should not have granted summary judgment for plaintiff).

McElhanon v. Hing, 151 Ariz. 386, 396, 728 P.2d 256, 266 (Ct. App. 1985) (court noted that Arizona Supreme Court overruled prior opinions regarding weight of circumstantial evidence, and held probative value of direct evidence and circumstantial evidence was intrinsically similar).

401.civ.056 Although a factual stipulation is binding on the parties, it is not binding on the jurors, thus a party may not be required by the trial court to accept a stipulation, the effect of which may not have the same effect on the jurors as the evidence that establishes the fact.

Arizona DOR v. Superior Ct., 189 Ariz. 49, 54, 938 P.2d 98, 103 (Ct. App. 1997) (fact that one party was willing to stipulate to witness's evaluation of the property did not preclude other party from calling that witness to give live testimony).

401.civ.057 Although a factual stipulation is not binding on the jurors, a stipulation of liability is binding on the jurors, thus if the jurors do not follow the stipulation about liability, the aggrieved party will be entitled to a new trial.

Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 15–20 (Ct. App. 2001) (truck driver turned in front of motorcycle causing death of motorcycle driver and serious injuries to motorcycle passenger; motorcycle passenger and family of motorcycle driver sued truck driver's employer; parties stipulated that truck driver was intoxicated and intoxication was proximate cause of accident; jurors returned verdict for plaintiffs and apportioned 100% of fault to defendant; because of stipulation, jurors were required to apportion some percentage of fault to truck driver, thus defendant was entitled to new trial).

401.civ.090 Evidence that an event did not happen is relevant, but only if the proponent makes an adequate showing that the witness was in such a situation, including position and attitude, or had access to such information, so that the witness would have been aware if the event had happened.

Isbell v. State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

401.civ.100 Evidence that a party did not call a certain person as a witness is relevant if (1) the person was under the exclusive control of that party, (2) the party would be expected to produce the person if that person's testimony would be favorable to that party, and (3) the person had exclusive knowledge of the existence or nonexistence of certain facts.

Gordon v. Liguori, 182 Ariz. 232, 895 P.2d 523 (Ct. App. 1995) (although defendants' uncalled expert witnesses arguably met first two factors, they did not meet third because their testimony was opinion, not fact, and opinion about defendants' negligence would not be within exclusive knowledge of these witnesses).

401.civ.120 In a negligence action or strict liability action based on design defect (but not in an action based upon manufacturing defect), evidence of nonexistence of prior accidents is relevant, but only if proponent makes an adequate showing that proponent was in such a situation or had access to information that would have made proponent aware of any accidents if they had happened.

Isbell v. State, 198 Ariz. 291, 9 P.3d 322, ¶ 9 (2000) (because defendant failed to make required foundational showing, including how many near accidents and how many fortuitous escapes from injury may have occurred, trial court did not abuse discretion in precluding evidence of absence of prior accidents at railroad crossing in question).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 19–22 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because park manager had served there for 8 years and lived there year-round, and because any fall off that wall would have resulted in serious injuries, park manager was permitted to testify that he knew of no other accidents at that wall), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

401.civ.195 Comparative fault principles apply in product strict liability actions, thus all evidence having a bearing on the fault of any of the participants is admissible.

Zuern v. Ford Motor Co., 188 Ariz. 486, 937 P.2d 676 (Ct. App. 1996) (plaintiff claimed evidence of non-party's intoxication was not relevant in claim of strict liability in automobile accident case; court held such evidence was admissible).

401.civ.225 When property is sold at a trustee's sale, the lender is entitled to a deficiency judgment for the amount owed less either the fair market value or the sale price at the trustee's sale, whichever is higher, but the credit bid for the property is not admissible as evidence of value because it does not reflect a sale after reasonable exposure in the market under conditions requisite to a fair sale.

* *Midfirst Bank v. Chase,* 230 Ariz. 366, 284 P.3d 877, ¶¶ 6–xx (Ct. App. 2012) (because only evidence of value lender presented was credit bid at trustee's sale, lender did not establish fair market value of property and thus trial court erred in granting lender's motion for summary judgment).

401.civ.245 In a wrongful death action, evidence of the manner of the decedent's death is admissible, but only to the extent that it caused the survivor to suffer mental anguish because of the death, and not to the extent that it showed the decedent suffered prior to death.

Girouard v. Skyline Steel, Inc., 215 Ariz. 126, 158 P.3d 255, ¶¶ 9–23 (Ct. App. 2007) (defendant's employee caused automobile collision that caused decedent's vehicle to burst into flames; decedent died of thermal and inhalation injuries, although there was conflict in evidence showing whether decedent was conscious at time of death; father sought to introduce evidence that fire was so intense that there was nothing of decedent's remains to identify and that decedent had been burned alive, and this caused father great pains; court noted wrongful death statute allows recovery for injury to surviving party caused by death, and that injury includes anguish, sorrow, stress, mental suffering, pain, and shock, thus trial court erred in excluding evidence of manner of decedent's death to extent knowledge of manner of death caused anguish, sorrow, stress, mental suffering, pain, or shock to father).

401.civ.275 In an action to recover punitive damages, the plaintiff must prove the defendant consciously pursued a course conduct knowing that it created a substantial risk of significant harm to other, thus evidence tending to prove or disprove this issue is relevant.

Belliard v. Becker, 216 Ariz. 356, 166 P.3d 911, ¶¶ 13–17 (Ct. App. 2007) (defendant was driving north on Highway 101 in right lane, crossed three lanes of traffic, ran into steel cables separating lanes, and stopped on southbound side of road facing north; defendant saw that cable was attached to his bumper, but he turned car around and drove south; as he drove away, he "felt a jerk on the front end" and eventually "lost control" and his car came to stop; he then noticed cable was wrapped around axle; it was later determined he dragged 1200 feet of cable down highway; while defendant was moving south, plaintiff's vehicle became entangled in cable and spun into embankment, injuring plaintiff; DPS officer could smell moderate odor of alcohol on defendant's breath; defendant admitted having "a couple of drinks earlier in the evening," and portable breath test showed .031 BAC; trial court granted defendant's motion in limine and precluded any evidence of defendant's alcohol consumption or bars he visited prior to collision; because defendant conceded negligence and liability, court agreed that evidence of alcohol consumption was not relevant to negligence and liability, but held it was relevant to issue of punitive damages, thus trial court erred in precluding it; court remanded for retrial on issue of punitive damages).

401.civ.340 If a party offers an experiment or model as an attempted replication of the litigated event, the conditions in the experiment or the model must substantially match the circumstances surrounding that event; if the experiment or model is not a purported replication but is more in the nature of a demonstration, it is appropriately admitted if it fairly illustrates a disputed trait or characteristic.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because videotape comparing conduct of defendant-seller with captain of Titanic contained information that was not admitted in evidence and was highly inflammatory, trial court should not have allowed plaintiff-buyer to play it during closing argument).

Criminal Cases

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

* *State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone call wherein caller admitted committing crime related to fact that was of consequence to determination of action, thus evidence of call was material).

State v. Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 25–27 (2008) (court concluded that details of crime were of consequence to determination whether killing was for pecuniary gain and whether defendant committed multiple murders; details of defendant's flight from scene were of consequence to determination whether killing was for pecuniary gain, and evidence about blood-stained furniture corroborated testimony about location of murders, which was of consequence to determination whether defendant committed multiple murders).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 63–66 (2008) (in mitigation, defendant claimed he suffered from mental health issues, including bipolar disorder, which caused him to have delusional involvement in militia; defendant's letters threatening harm to those who mistreated leader of militia were relevant because they rebutted suggestion that defendant's involvement in militia was benign).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–49 (2007) (defendant contended montage of 44 photographs showing corpses and autopsies was not relevant; state contended montage related to issue whether defendant's killing of victim was cruel; court concluded photographs had some minimal relevancy to cruelty prong).

State v. Arellano (Apelt), 213 Ariz. 474, 143 P.3d 1015, ¶¶ 14–22 (2006) (court held that trial court erred as matter of law in ruling that evidence of defendant's adaptive behavior after age 18 years was not relevant and in ruling that state could not present testimony of AzDOC personnel).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 57–58 (2006) (in search of defendant's girlfriend's house, officers found .22 caliber handgun in car parked in garage; girlfriend told officers defendant possessed that gun at some point; defendant's daughter told police defendant had been in their house after date of murders; print examiner matched defendant's print to one of eight prints on gun; court held evidence of gun was relevant because it established defendant possessed gun before and after killings, and combined with evidence that codefendant did not possess gun, made less likely defendant's story that he participated only because codefendant threatened him with gun).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 50–51 (2006) (defendant sought to introduce statements codefendant made to fellow jail inmate; court noted that statements might be marginally relevant to support defendant's claim that codefendant, as ringleader, forced defendant to participate in murders, but held that, because duress is not defense to murder, any error in excluding statements would have been harmless).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 65–66 (2004) (defendant contended trial court's preclusion of evidence that detective had improperly recorded and then erased portion of defendant's coerced inculpatory statements (which were subsequently suppressed) "gutted his defense" because this was probative of police sloppiness; trial court found this evidence was not relevant to any disputed issue; court agreed and found no abuse of discretion).

State v. Finch, 202 Ariz. 410, 46 P.3d 421, ¶¶ 19–20 (2002) (defendant shot victim in back as victim was fleeing; defendant claimed that, because police did not find victim in time to save his life, time it took police to find victim constituted superseding event that proximately caused victim's death; court noted that, although victim might have survived had he received prompt medical attention, he would not have died if defendant had not shot him, thus causation was not an issue and trial court did not err in not giving proximate cause instruction).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 49 (2001) (because defendant questioned witnesses about relationship between defendant's brother and third person in attempt to show defendant's brother was person who did killings, relationship between defendant and that person was of consequence and letter from defendant to that person related to that issue, thus letter was material).

State v. Bass, 198 Ariz. 571, 12 P.3d 796, ¶¶ 10–14 (2000) (defendant drove above speed limit in right lane when vehicle in left lane moved partially into right lane, whereupon defendant swerved right and vehicle's right wheels rode curb for moment, until passenger grabbed steering wheel and jerked it to left, causing defendant to lose control of vehicle, which then spun across center line and into incoming traffic, causing multi-car collision and death and injuries to others; court rejected defendant's argument that jurors should be instructed that, for actions to be superseding causes, passenger's action in grabbing steering wheel would have to be both unforeseeable and abnormal/extraordinary because that action was in response to defendant's actions, while other driver's action in moving into lane would have to be merely unforeseeable because that action was coincidental; court held instead both types of acts must be both unforeseeable and either abnormal or extraordinary).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 56–57 (1999) (evidence comparing lead fragments from victim's head to lead ammunition from defendant's home was relevant because it showed defendants possessed ammunition consistent with that used to kill victim).

State v. Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 24–25 (1998) (because one issue at sentencing was whether defendant acted in an especially heinous or depraved manner, letter showing defendant's state of mind was material).

State ex rel. Thomas v. Duncan (Reagan), 216 Ariz. 260, 165 P.3d 238, ¶¶ 11–15 (Ct. App. 2007) (defendant's claim that he was fleeing from road rage situation when he ran red light and killed victim was of consequence to determination of defendant's mental state (whether defendant was aware of and consciously disregarded substantial and unjustifiable risk), and thus evidence was material).

State v. Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 36–39 (Ct. App. 2007) (trial court allowed defendant to introduce evidence that he smuggled handcuff key into prison facility not to escape but to defend himself from beating he feared was imminent; court held trial court did not abuse discretion in precluding evidence why defendant thought he would be beaten).

State v. Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

State v. Gay, 214 Ariz. 214, 150 P.3d 787, ¶¶ 37–40 (Ct. App. 2007) (defendant contended trial court erred in precluding expert testimony on effect withdrawal from cocaine would have had on defendant during police interviews; court noted trial court found no evidence of police coercion, and without that predicate, expert proffered testimony was not relevant).

State v. Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant).

State v. Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 13–16 (Ct. App. 2002) (in home invasion, defendant and cohort demanded drugs and money; when police arrived, cohort shot and killed himself; defendant was charged with four counts of kidnapping, and claimed duress, contending that, because of erratic and violent behavior of cohort, she felt compelled to assist cohort in home invasion; defendant claimed trial court erred in precluding evidence of cohort's earlier suicide attempt, contending this evidence was relevant (material) to whether she acted under duress; court held that, in light of other evidence, any error in precluding this evidence was harmless).

State v. Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–15 (Ct. App. 2002) (in manslaughter prosecution, because spontaneous deployment of passenger-side air bag with its accompanying noise could be considered both unforeseeable and either abnormal or extraordinary and thus qualify as superseding cause, it was relevant (material) to whether defendant acted recklessly).

State v. Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–15 (Ct. App. 2002) (defendant intended to testify that he consumed same amount of alcohol as victim while they were bar-hopping, and sought to introduce evidence of victim's blood alcohol content; because parties stipulated that defendant's blood alcohol content was 0.16, that evidence was not relevant (material)).

Guthrie v. Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 12–18 (Ct. App. 2002) (because it is alcohol in blood that causes impairment, if state presents only evidence of percentage of alcohol in defendant's breath to establish presumptively that defendant was under influence of alcohol, testimony about breath-to-blood partition ratios is relevant (material) to charge under § 28–1381(A)(1)).

Guthrie v. Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 10–11 (Ct. App. 2002) (although alcohol in blood causes impairment, because § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant (material) to (A)(2) charge).

Beijer v. Adams, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 23, 25 (Ct. App. 1999) (when defendant is charged with transportation of drugs, such evidence as smell of hair spray, presence of snack wrappers, and dirty clothes admissible so long as not tied to what other drug couriers do).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 45 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment "so if anything happens to me you know who was here"; this statement related to identity of person who murdered victim, and thus was relevant in the materiality sense).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 49, 61 (Ct. App. 1998) (defendant was charged with killing Mustaf's pregnant ex-girlfriend; jail tapes of defendant talking with Mustaf about obtaining attorney were relevant to overall theory of cooperation between defendant and Mustaf).

State v. Acinelli, 191 Ariz. 66, 952 P.2d 304 (Ct. App. 1997) (although impeachment material is always relevant, defendant made no showing officers' files might contain such information, thus failed to show materiality; trial court therefore properly refused to order search of files).

State v. Baldenegro, 188 Ariz. 10, 932 P.2d 275 (Ct. App. 1996) (for assisting and participating in criminal syndicate for benefit of street gang, state had to prove "Carson 13" was criminal street gang, thus evidence of criminal activity by members of "Carson 13" was relevant).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

* *State v. Cota,* 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

State v. Dixon, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–45 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary, which he claimed contained victim's statement she had been sexually assaulted in Europe and would fight back if sexually assaulted again; court held statements had little probative value, thus trial court did not abuse discretion in precluding them).

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 24 (2011) (only issue in case was whether defendant or someone else committed murder; telephone caller admitted committing crime and there were strong indications defendant was not caller, thus evidence of telephone call made facts of defendant's guilt less probable and was therefore relevant).

State v. Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 25–27 (2008) (court concluded that details of crime made it more probable that defendant killed for pecuniary gain and that defendant committed multiple murders; details of defendant's flight from scene made it more probable that defendant killed for pecuniary gain, and evidence about blood-stained furniture corroborated testimony about location of murders, which made it more probable that defendant committed multiple murders

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 63–66 (2008) (in mitigation, defendant claimed he suffered from mental health issues, including bipolar disorder, which caused him to have delusional involvement in militia; defendant's letters threatening harm to those who mistreated leader of militia were relevant because they rebutted suggestion that defendant's involvement in militia was benign).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–49 (2007) (defendant contended montage of 44 photographs showing corpses and autopsies was not relevant; state contended montage showed defendant knew that manner in which he killed victim would cause her to suffer; court concluded photographs had some minimal relevancy to cruelty prong).

State v. Arellano (Apelt), 213 Ariz. 474, 143 P.3d 1015, ¶¶ 14–22 (2006) (court held trial court erred as matter of law in ruling that evidence of defendant's adaptive behavior after age 18 years was not relevant and in ruling state could not present testimony of AzDOC personnel).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 57–58 (2006) (in search of defendant's girlfriend's house, officers found .22 caliber handgun in car parked in garage; girlfriend told officers defendant possessed that gun at some point; defendant's daughter told police defendant had been in their house after date of murders; print examiner matched defendant's print to one of eight prints on gun; court held evidence of gun was relevant because it established defendant possessed gun before and after killings, and combined with evidence that codefendant did not possess gun, made less likely defendant's story that he participated only because codefendant threatened him with gun).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 50–51 (2006) (defendant sought to introduce statements codefendant made to fellow jail inmate; court noted that statements might be marginally relevant to support defendant's claim that codefendant, as ringleader, forced defendant to participate in murders, but held that, because duress is not defense to murder, any error in excluding statements would have been harmless).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 49 (2001) (because defendant questioned witnesses about relationship between defendant's brother and third person in attempt to show defendant's brother was person who did killings, relationship between defendant and that person was of consequence and letter from defendant to that person made existence of relationship more probable, thus letter was relevant).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 56–57 (1999) (evidence comparing lead fragments from victim's head to lead ammunition from defendant's home was relevant because it showed defendants possessed ammunition consistent with that used to kill victim).

State v. Greene, 192 Ariz. 431, 967 P.2d 106, ¶¶ 24–25 (1998) (because letter showed defendant's callous fascination with being convicted murderer apparently headed for death row, it was relevant in showing defendant's especially heinous or depraved state of mind).

State ex rel. Thomas v. Duncan (Reagan), 216 Ariz. 260, 165 P.3d 238, ¶¶ 11–15 (Ct. App. 2007) (defendant's claim that he was fleeing from road rage situation when he ran red light and killed victim could make it more or less probable that he was not aware of and did not consciously disregarded substantial and unjustifiable risk, thus evidence was relevant).

State v. Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

State v. Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed that defendant touched daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence of incestuous pornographic material was not relevant; court noted that, although expert testified that interest in pornography does not establish causal relationship with propensity to commit child molestation, expert testified that "it is a link," thus evidence was relevant).

State v. Vandever, 211 Ariz. 206, 119 P.3d 473, ¶ 15 (Ct. App. 2005) (defendant made illegal left turn from right lane; oncoming car collided and passenger died; defendant proffered evidence that he had close and caring relationship with victim; trial court precluded that evidence; court held that issue was whether defendant acted recklessly on night in question, and that evidence of how he acted toward victim in past did not make it any more or less likely that he acted recklessly on night in question).

State v. Jeffrey, 203 Ariz. 111, 50 P.3d 861, ¶¶ 13–16 (Ct. App. 2002) (in home invasion, defendant and cohort demanded drugs and money; when police arrived, cohort shot and killed himself; defendant was charged with four counts of kidnapping, and claimed duress, contending that, because of erratic and violent behavior of cohort, she felt compelled to assist cohort in home invasion; defendant claimed trial court erred in precluding evidence of cohort's earlier suicide attempt, contending this evidence was relevant (relevance) because it made it more likely she acted under duress; court held that, in light of other evidence, any error in precluding this evidence was harmless).

State v. Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 13–18 (Ct. App. 2002) (because it was equally possible that injuries could have been caused if (1) air bag had deployed properly but unbelted passenger eluded air bag's protection or (2) air bag had deployed without warning or apparent reason, startling defendant and causing him to veer off roadway, evidence was relevant (relevance) to whether defendant acted recklessly).

Guthrie v. Jones (State of Arizona), 202 Ariz. 273, 43 P.3d 601, ¶¶ 12–18 (Ct. App. 2002) (because amount of alcohol in blood causes impairment, and because such factors as gender, blood consistency, breathing patterns, body temperature, phase of alcohol metabolism, ventilation-perfusion abnormalities, ethanol in the mouth, regurgitation of alcoholic stomach contents, barometric pressure, and elevation above sea level affect breath-to-blood partition ratios, if state presents only evidence of percentage of alcohol in defendant's breath to establish presumptively defendant was under influence of alcohol, testimony about breath-to-blood partition ratios is relevant (relevance) to charge under 1381(A)(1)).

Beijer v. Adams, 196 Ariz. 79, 993 P.2d 1043, ¶¶ 23, 25 (Ct. App. 1999) (when defendant is charged with transportation of drugs, such evidence as smell of hair spray, presence of snack wrappers, and dirty clothes admissible so long as not tied to what other drug couriers do).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 45 (Ct. App. 1998) (murder victim telephoned friend and told her "Vonnie" was at her apartment "so if anything happens to me you know who was here"; this statement made it more likely that defendant was person who murdered victim, and thus was relevant in the relevancy sense).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 49, 61 (Ct. App. 1998) (defendant was charged with killing Mustaf's pregnant ex-girlfriend; jail tapes of defendant talking with Mustaf about obtaining attorney were relevant to overall theory of cooperation between defendant and Mustaf).

State v. Acinelli, 191 Ariz. 66, 952 P.2d 304 (Ct. App. 1997) (although impeachment material is always relevant, defendant made no showing that officers' files might contain such information, thus failed to show materiality; trial court therefore properly refused to order search of files).

State v. Fillmore, 187 Ariz. 174, 927 P.2d 1303 (Ct. App. 1996) (although defendant denied being part of chop-shop operation, his statements tended to prove familiarity with enterprise and consciousness of guilt, thus they were relevant).

State v. Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (testimony that seat cover was off car 3 months prior to murder was relevant because it made it more likely seat cover was off when victim was shot, and remoteness went to weight and not admissibility).

401.cr.021 Under former evidence theory, evidence was material if it addressed an issue in the case, and was relevant if it tended to establish the proposition for which it was offered; these two concepts are now covered by relevancy under the modern rules of evidence.

State v. Orantez, 183 Ariz. 218, 902 P.2d 824 (1995) (to obtain new trial based on newly-discovered evidence, defendant had to establish evidence was material, and court noted that question of materiality is now subsumed in relevance rule).

401.cr.025 The standard of relevance is not particularly high.

State v. Taylor, 169 Ariz. 121, 122, 124 & n.3, 817 P.2d 488, 489, 490 & n.3 (1991) (defendant, his girlfriend, and their children lived together in girlfriend's apartment; victim (girlfriend's brother) argued with defendant and told him he had 30 days to get out, which started fight; before he left, victim told defendant he would be back and would "kick his butt"; victim returned next day and threatened defendant, which again started fight; when fighting stopped, victim went to his truck, where defendant believed victim carried gun, and defendant went into apartment and came out with gun; as victim was moving toward apartment, defendant shot at him, hitting him three times, two in the back; defendant was charged with first-degree murder and convicted of second-degree murder; before trial, state moved to preclude evidence of victim's child abuse conviction for immersing child in bathtub with scalding water; trial court found 4-year-old conviction did not "shed much light" on issue of who was aggressor; court held victim's prior conviction was crime of violence, and that, because defendant knew of victim's prior conviction before shooting, that evidence was relevant because (1) it related to whether defendant was justifiably apprehensive for his own safety, and (2) it related to whether defendant was justifiably apprehensive for safety of his two children in apartment at time of shooting).

State v. Oliver, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (court held that, if accused raises defense of fabrication, and if minor victim was of such tender years that jurors might infer that only way victim could testify in detail about alleged molestation was because defendant had in fact sexually abused victim, then evidence of victim's prior sexual history would be relevant to rebut such inference).

State v. Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant was charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; defendant contended this evidence lacked sufficient probative value to clear relevance threshold; court noted standard for relevance was not particularly high and held this evidence was relevant).

State v. Speers, 209 Ariz. 125, 98 P.3d 560, ¶¶ 2–9, 26–31 (Ct. App. 2004) (on April 28, 2000, two children made accusations against defendant that led to his being charged with child molestation; on May 4, 2000, officers searched defendant's parents home and seized his computer, passport, and printout of airline travel information from Expedia.com. for trip to Lisbon, Portugal, May 7, 2000, and return to Phoenix August 6, 2000; based on images found in defendant's computer, he was charged with 18 counts of sexual exploitation of minor; at sexual exploitation trial, trial court admitted evidence of passport and travel information and gave flight instruction; court held that trial court did not abuse discretion in admitting "flight" evidence, but strength of this evidence was not sufficient to justify flight instruction).

State v. Paxson, 203 Ariz. 38, 49 P.3d 310, ¶¶ 3–5, 13–18 (Ct. App. 2002) (defendant lost control of vehicle while leaving s-shaped switchback going 70 to 75 m.p.h. in 45 m.p.h. zone; vehicle left road and hit tree, killing passenger; defendant's BAC was .16; trial court precluded defendant from presenting expert testimony from which jurors could have inferred passenger-side air bag deployed prematurely, thus distracting defendant and causing him to veer off road; court held desired inference, although arguably tenuous, was not unreasonable, thus trial court erred in precluding this evidence).

State v. Kiper, 181 Ariz. 62, 64–65, 887 P.2d 592, 594–95 (Ct. App. 1994) (defendant was charged with embezzling money from his employers; defendant alleged charges against him were false and brought by employers in retaliation for public accusations he made against them; defense witness testified on direct examination that, shortly before defendant was terminated, employer said he did not want defendant working books because, among other things, "[h]e had some things in his background that they found out about"; trial court then allowed state to introduce evidence that defendant's "background" involved criminal record; court held evidence of criminal record was relevant to rebut defendant's retaliation theory).

401.cr.030 If evidence does not tend to make the existence of any fact of consequence more or less probable, it is not relevant and therefore is not admissible.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶¶ 71–73 (2003) (at trial, defendant contended he confessed because he feared reprisals from codefendant; trial court allowed state to impeach that testimony with fact that, at suppression hearing, defendant contended only that officers' actions made his statements involuntary and never mentioned anything about codefendant; court held that, because codefendant was not in any way connected with state, what codefendant did to defendant was irrelevant to issue of voluntariness, so trial court erred in allowing state to impeach defendant's trial testimony with his testimony given at suppression hearing).

State v. Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 37–39 (2003) (defendant sough to introduce evidence of drugs in victims' systems in order to discredit medical examiner's testimony about how quickly victims died; because medical examiner testified drugs in system probably did not

make substantial difference in time it took victims to die, evidence of drugs in victims' systems was not relevant, thus trial court did not abuse discretion in excluding this evidence).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 66–68 (1999) (because defendant was not charged with sexual assault, and there was no evidence that defendant had ever made any sexual advances toward victim or had sexual relationship with her, evidence about swab tests taken from victim's mouth, vagina, and rectum did not relate to an issue in controversy (materiality), and thus was not relevant).

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶¶ 66–68 (1999) (because evidence about swab tests taken from victim's mouth, vagina, and rectum was "moderately positive" but inconclusive, it did not make any fact that is of consequence more or less probable (relevance), and thus was not relevant).

State v. Doody, 187 Ariz. 363, 930 P.2d 440 (Ct. App. 1996) (Arizona has never held that substantial similarities of circumstances, interrogators, and defendants could render voluntariness of one confession relevant to issue of another confession's voluntariness).

401.cr.040 Although results of field sobriety tests (FSTs) are not admissible to quantify an accused's blood alcohol concentration, they are relevant evidence of an accused's impairment, thus an officer may testify about the manner in which defendant performed the FSTs, and may testify they administered FSTs in an attempt to determine whether defendant was in fact intoxicated and was intoxicated while driving.

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

401.cr.042 For a charge of driving under the influence under A.R.S. § 28–1381(A)(1), either party may introduce evidence of the defendant's BAC.

* *State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–17 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

401.cr.044 Once a party introduces evidence of the defendant's breath BAC in a charge under A.R.S. § 28–1381(A)(1), testimony about breath-to-blood partition ratios is relevant, and that includes partition ratios in the general population, and not just the defendant's partition ratio at the time of the breath test.

* *State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 19–25 (Ct. App. 2012) (court rejected state's argument that partition ratio evidence is limited to defendant's partition ratio at time of breath test).

401.cr.046 Although it is the amount of alcohol in the blood that causes impairment, because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant to a charge under § 28–1381(A)(2).

* *State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶ 25 (Ct. App. 2012) (court reaffirms this holding from *Guthrie v. Jones,* 202 Ariz. 273, 43 P.3d 601 (Ct. App. 2002)).

401.cr.048 For a charge under A.R.S. § 28-1381(A)(1) or (A)(2), if a party introduces evidence of a BAC reading taken from a breathalyzer, testimony of how breathing patterns, breath and body temperature, and hematocrit (device for separating cells and other particulate elements of blood from plasma) could affect the BAC reading is relevant.

* *State v. Cooperman,* 230 Ariz. 245, 282 P.3d 446, ¶¶ 26-30 (Ct. App. 2012) (court rejected state's argument that such evidence is inadmissible unless defendant can offer evidence of own physiology at time of breath test).

401.cr.050 Arizona law makes no distinction between direct and circumstantial evidence.

State v. Bible, 175 Ariz. 549, 560 & n.1, 858 P.2d 1152, 1163 & n.1 (1993) (court stated guilty verdicts were primarily based on circumstantial evidence, bout noted there was no distinction between probative value of direct and circumstantial evidence).

State v. Harvill, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) (opinion of court was that probative value of direct and circumstantial evidence was intrinsically similar; therefore, there was no logically sound reason for drawing distinction in weight to be assigned each).

* *State v. Bustamante,* 229 Ariz. 256, 274 P.3d 526, ¶¶ 5-6 (Ct. App. 2012) (court considered circumstantial evidence to determine whether evidence was sufficient to show defendant's involvement in kidnapping).

State v. Musgrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 5-7 (Ct. App. 2009) (defendant's requested instruction drew distinction between weight assigned to circumstantial versus direct evidence by implying that greater degree of proof was required for jurors to rely on circumstantial evidence; because direct and circumstantial evidence are of intrinsically similar probative value, there is no logically sound reason for drawing distinction in weight to be assigned to each, thus trial court properly refused to give defendant's requested instruction).

401.cr.055 Although a factual stipulation is binding on the parties, it is not binding on the jurors.

State v. Allen, 223 Ariz. 125, 220 P.3d 245, ¶¶ 1, 11 (2009) (defendant was charged with possession of marijuana; trial court read to jurors stipulation between defendant and state that defendant was in possession of usable amount of marijuana; court held that, when defendant stipulates to elements of an offense, unless defendant pleads guilty to the offense, trial court does not have to go through guilty plea litany).

State v. Carreon, 210 Ariz. 54, 107 P.3d 900, ¶¶ 44-47 (2005) (trial court should not have instructed jurors that stipulation satisfied element of offense; defendant did not object, and court found any error was not fundamental).

State v. Virgo, 190 Ariz. 349, 353, 947 P.2d 923, 927 (Ct. App. 1997) (although parties stipulated that marijuana involved weighed 35 pounds, jurors were not bound by that stipulation; because jurors did not determine weight of marijuana, trial court erred in sentencing defendant for Class 4 felony; court remanded for sentencing for Class 6 felony).

401.cr.056 Although a factual stipulation is binding on the parties, it is not binding on the jurors, thus a party may not be required by the trial court to accept a stipulation, the effect of which may not have the same effect on the jurors as the evidence that establishes the fact.

State v. Lopez, 209 Ariz. 58, 97 P.3d 883, ¶¶ 4–8 (Ct. App. 2004) (defendant charged with misconduct involving weapons (possession of firearm by prohibited possessor), which is person who has been convicted of felony and whose civil right to carry firearm has not been restored; defendant offered to stipulate to fact he was prohibited possessor to prevent state from presenting to jurors evidence of his prior conviction and evidence his right to possess firearm had not been restored; state rejected offer and trial court refused to force state to accept stipulation; court held, because prior conviction and non-restoration of civil right were elements of offense, defendant had no right to preclude jurors from receiving evidence of those matters).

State v. Newnom, 208 Ariz. 507, 95 P.3d 950, ¶¶ 2–5 (Ct. App. 2004) (defendant was charged with aggravated domestic violence; defendant offered to stipulate to existence of prior convictions to avoid having jurors receive that information; state rejected offer and trial court refused to force state to accept stipulation; court held that prior convictions are elements of aggravated domestic violence under A.R.S. § 13–3601.02, thus defendant was not entitled to bifurcated trial on issue of prior convictions and had no right to preclude jurors from receiving evidence of prior convictions).

401.cr.060 Exclusion of irrelevant evidence does not deny a defendant the Sixth Amendment right to present evidence.

State v. Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 33 (Ct. App. 2003) (victim left with defendant; 3 days later, defendant told girlfriend he had killed victim; defendant then confessed to police and took them to location of victim's body; at trial, defendant sought to introduce following evidence that he contended showed another person committed crime: night of murder, witness had seen M.H. and T.J. acting suspiciously and with injuries on their arms, and said victim had told her she was pregnant with M.H.'s child; another witness said he had overheard M.H. and T.J. making incriminating statements about their role in victim's death; suitcase characterized as portable methamphetamine lab had been found near where victim was killed, and when M.H. was arrested 1 month after murder, he had portable methamphetamine lab in car; court excluded this evidence as not relevant; on appeal, defendant contended this violated his constitutional right to present evidence; court held exclusion of irrelevant evidence does not violate defendant's constitutional rights).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 31–32 (Ct. App. 1998) (trial court granted state's motion to preclude evidence that someone other than defendant killed victim; court held this rule was essentially application of rule excluding evidence that is not relevant, and did not violate defendant's constitutional right to present evidence).

401.cr.070 Negative evidence is not *per se* inadmissible, but is admissible only if there is a showing that evidence of the event would have been apparent if it had happened.

State v. Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 2–6 (Ct. App. 2007) (defendant charged with robbery at commercial store; after reviewing suspect descriptions and *modus operandi* of two other robberies at commercial stores, detective concluded that same person had committed those robberies; trial court permitted detective to testify that, after date that defendant was arrested, there had been no other similar robberies in the area; court held this evidence was relevant).

401.cr.080 Evidence that a person did not say something (negative evidence) is relevant, but only if the proponent makes an adequate foundational showing that the person probably would have made a statement under the circumstances.

* *State v. VanWinkle,* 229 Ariz. 233, 273 P.3d 1148, ¶ 7 (2012) (defendant shot victim, G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda*; court held admission of statement did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court held any error was harmless).

401.cr.100 Evidence that a party did not call a certain person as a witness (negative evidence) is relevant if (1) the person was under the exclusive control of that party, (2) the party would be expected to produce the person if that person's testimony would be favorable to that party, and (3) the person had exclusive knowledge of the existence or nonexistence of certain facts.

State v. Conroy, 114 Ariz. 499, 500–01, 562 P.2d 379, 380–81 (1977) (because witness was available only to defendant, prosecutor could comment on defendant's failure to call that witness).

State v. Cozad, 113 Ariz. 437, 439, 556 P.2d 312, 314 (1976) (because person was within defendant's control and presumably would have given testimony favorable to defendant, state was permitted to comment on defendant's failure to call that person as witness).

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 19–20 (Ct. App. 2011) (court held that, for jury instruction that neither side is required to call as witnesses all persons who may have been present at the time of the events in question or who may have some knowledge of those events or to produce all objects or documents mentioned or suggested by the evidence, jurors would take that instruction to mean state need not produce every scrap of evidence available).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 22–24 (Ct. App. 2002) (trial court instructed jurors: "Neither side is required to call as witnesses all persons who may have been present at an event disclosed by the evidence or who may appear to have some knowledge of these events or to produce all documents or evidence suggested by the evidence"; court quoted other instructions informing jurors that state had burden of proof, defendant was not required to prove innocence, and defendant was not required to present any evidence; court held trial court's instruction did not shift burden of proof to defendant, and that it was not error to give instruction).

State v. Corona, 188 Ariz. 85, 89–90, 932 P.2d 1356, 1360–61 (Ct. App. 1997) (because there was no evidence presented that defendant had retained an expert, prosecutor should not have commented on defendant's failure to call an expert).

State v. Jerdee, 154 Ariz. 414, 417–18, 743 P.2d 10, 13–14 (Ct. App. 1987) (because officer was equally available to both sides, once defendant's attorney argued jurors should construe state's failure to call that officer against state, prosecutor was permitted to argue that officer was equally available to both sides, and thus jurors could assume his testimony would not have added anything to either side).

State v. Filipov, 118 Ariz. 319, 324, 576 P.2d 507, 512 (Ct. App. 1977) (because state failed to show person who took property to defendant would have given testimony favorable to defendant, state erred in arguing inferences from defendant's failure to call that person as witness).

401.cr.115 In determining whether to admit evidence that another person may have committed the crime, the court must assess the effect this evidence would have on the defendant's culpability; if the evidence merely casts suspicion or speculation about a class of persons and does not show that another person had the motive and opportunity to commit the crime, this would not tend to create a reasonable doubt about the defendant's guilt, so that evidence would not be relevant and thus not admissible.

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 81–83 (2004) (court held that evidence that victim was unpopular did not tend to create reasonable doubt about defendant's guilt).

State v. Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated that any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v. Tucker, 205 Ariz. 157, 68 P.3d 110, ¶¶ 28–32 (2003) (defendant wanted to introduce following evidence to show P.K. might be the killer: P.K. new all three victims; he did not like victim R.M.; he did not like blacks (defendant was black; victims R.M. and Am.M. were black-white bi-racial); he had spoken derogatorily about R.M. in particular and blacks in general; he had access to guns; he gave defendant one of his three sets of handcuffs; and he pled guilty to another murder that occurred 2 months before present murders; court stated this evidence only minimally indicated P.K. had motive, but there was no evidence showing P.K. had opportunity to kill the victims; court stated, "Without some evidence tending to connect P.K. to the crime scene, Tucker's speculation that P.K. might have been the killer is arguably irrelevant, and therefore would likely have been found inadmissible").

State v. Blakley, 204 Ariz. 429, 65 P.3d 77, ¶¶ 63–67 (2003) (defendant charged with first-degree murder and sexual assault in the death of his girl-friend's 16-month-old daughter, Shelby; defendant wanted to introduce following evidence about his cousin Fred: (1) when Fred was 13 to 15 years old, he repeatedly molested Keri, his 6- or 7-year-old female cousin, for which he was adjudicated delinquent in juvenile court; (2) Fred had telephoned Keri in 1999 and yelled at her; (3) Fred had fight with Keri's brother; (4) Fred had history of cruelty to animals; (5) after newspaper article indicated that cousin of defendant may have caused Shelby's death, Keri began receiving hang-up phone calls; (6) when Fred was young, he had been molested; (7) Fred was beaten by his father; (8) Fred's father died of AIDS; and (9) Fred had engaged in self-mutilation; court noted defendant never attempted to show Fred was at scene of crime on day of murder and noted that molestation committed by Fred was not similar to sexual assault committed on Shelby, thus evidence was not relevant and thus not admissible).

State v. Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 25–28 (2002) (African-American man and white or Hispanic man with bandana on face robbed bar while armed with handgun and sawed-off rifle; 11 days later, defendant and African-American man robbed another bar while armed with handgun and sawed-off rifle; 5 days later, defendant and African-American man robbed another bar while armed with handgun and sawed-off rifle; defendant and codefendant (who was African-American) were charged with all three robberies; defendant sought to introduce evidence that (1)African-American man other than codefendant confessed to committing first robbery, (2) that person had history of robbery and criminal behavior and carried gun, (3) witness identified this other person with white man at bar night before robbery, and (4) police searched this person's apartment after first robbery and found empty .38 caliber handgun box; court noted that, even if this evidence showed other person rather than codefendant committed robberies, this would not exculpate defendant, thus trial court properly precluded this evidence).

State v. Ring, 200 Ariz. 267, 25 P.3d 1139, ¶¶ 27–32 (2001) (although evidence was relevant to show another person was involved in planning crimes and thus implicated that other person, evidence did not exculpate defendant in planning and commission of crimes, thus trial court did not err in precluding evidence).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶¶ 38–40 (1998) (only similarities were both victims were about same age and were strangled, and because victim in crime charged showed bite marks, had been sexually assaulted, and strangled with ligature, but other crime did not have these features, other crime was not sufficiently similar to be admissible).

State v. Jones, 188 Ariz. 388, 937 P.2d 310 (1997) (evidence that, 90 days before the murder of the 4-year-old victim, victim's mother had given victim's older sister "hard" spanking did not have any tendency to connect victim's mother with sexual abuse and murder of victim).

State v. Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (1996) (because evidence that another person threatened victim prior to murder did not identify that person, and even if it did implicate particular person, there was no showing that person was connected to crime, trial court properly precluded this evidence).

* *State v. Alvarez,* 228 Ariz. 579, 269 P.3d 1203, ¶¶ 3–7 (Ct. App. 2012) (victim's home was burglarized, and water bottle with defendant's DNA was found in kitchen; defendant contended trial court erred in excluding evidence concerning R., who was landscaper: (1) R. was present in victim's back yard pursuant to schedule when victim left home prior to burglary, (2) R. had worked at victim's house on six to eight prior occasions and presumably knew she would not return anytime soon; (3) R. was in victim's fenced back yard, which gave ready access to point of entry, back door of house; (4) R. never returned to victim's house in 4 years following burglary; and (5) R. had prior felony conviction for property crime; court held none of this evidence connected R. to burglary, thus trial court properly excluded that evidence).

State v. Davis, 205 Ariz. 174, 68 P.3d 127, ¶¶ 17–31 (Ct. App. 2003) (victim left with defendant; 3 days later, defendant told girlfriend he had killed victim; defendant then confessed to police and took them to location of victim's body; at trial, defendant sought to introduce following evidence that he contended showed another person committed crime: night of murder, witness said victim had told her she was pregnant with M.H.'s child, had seen M.H. and T.J. acting suspiciously and with injuries on their arms; another witness said he had overheard M.H. and T.J. making incriminating statements about their role in victim's death; suitcase characterized

as portable methamphetamine lab had been found near where victim was killed, and when M.H. was arrested 1 month after murder, he had portable methamphetamine lab in car; court held this evidence was not relevant because it did not have tendency to create reasonable doubt about defendant's guilt for following reasons: many transients frequented murder site and defendant himself told police methamphetamine lab was there night of murder; state had obtained victim's medical records, which showed she tested negative for pregnancy; there was no evidence either M.H. or T.J. had been near murder site on night of murder; and there was no evidence victim had struggled prior to death).

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 29–30 (Ct. App. 1998) (trial court granted state's motion to preclude evidence that someone other than defendant killed victim; defendant conceded much of evidence in question was admitted at trial, and failed to establish what evidence he was precluded from presenting).

401.cr.120 In determining whether to admit evidence that another person may have committed the crime, the trial court must assess the effect this evidence would have on the defendant's culpability; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it.

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶ 16 (2011) (court held trial court erred in excluding evidence indicating someone other than defendant killed victim).

State v. Prion, 203 Ariz. 157, 52 P.3d 189, ¶¶ 19–27 (2002) (trial court erred in not admitting following evidence about another person: That person and victim were co-workers at restaurant; person had been disciplined for sexually harassing female co-workers at work, but tried to hide that fact from police; he had attempted to rape female co-worker at his apartment after work; he had violent temper and bit woman's nose during fight; he was also working in nightclub where victim was last seen on night victim disappeared, but he denied that fact when police questioned him; when doorman let victim into nightclub night she disappeared, she had specifically asked to see that person; he rented new apartment day victim disappeared, and that apartment was near both nightclub where victim was last seen and where victim's car was found; and when person appeared for work at restaurant morning after victim disappeared, he was so disheveled and disoriented that he was fired).

State v. Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 9–16 (2002) (evidence showed defendant, victim, and two other individuals were from same small Arizona town; these two individuals had been with victim shortly before murder, both gave alibis that could not be corroborated, both knew substantial information about crime that had not been made known to public; one of them had mental problems, and there was alleged sexual relationship between his wife and victim; trial court used "inherent tendency" test and excluded this evidence; court rejected "inherent tendency" test, held this type of evidence should be analyzed under Rules 401, 402, and 403, and reversed conviction).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–43 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that victim's wife murdered victim: (1) victim had recently increased amount of life insurance for which wife was sole beneficiary; (2) wife was not excluded as contributor to DNA found in victim's vehicle; and (3) wife had acted suspiciously when officers came to her home night victim was murdered; court stated proposed evidence constituted no more than vague grounds of suspicion and was trivial once placed in

context, and thus held evidence did not create reasonable doubt about defendant's guilt, so trial court did not abuse discretion in precluding that evidence).

State v. Bigger, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 40–46 (Ct. App. 2011) (defendant contended trial court abused discretion in excluding evidence that co-defendant dentist's friend's husband, D.H., murdered victim: (1) co-workers saw D.H. cleaning and discarding "bloody knife," (2) D.H.'s whereabouts were unknown night of murder, and (3) D.H. asked co-worker if she would ever kill for money; court noted that, after initial uncertainty, co-worker K.E. was certain D.H. cleaned and discarded "bloody knife" months before murder, and question about killing for money was hearsay and did not come under any hearsay exception, and was not more than hypothetical question, and thus held trial court did not abuse discretion in precluding that evidence).

State v. Machado, 224 Ariz. 343, 230 P.3d 1158, ¶¶ 25–56 (Ct. App. 2010) (court concluded **trial court erred in excluding** following evidence: (1) some time within 9 months prior to victim's murder, J. kidnapped his girlfriend and her sister by pointing older looking revolver at them; (2) 1 year after victim's murder J. was charged with aggravated assault for "road rage" incident when he pointed revolver at another driver and passenger; (3) 5 years after victim's murder J. was convicted of assault for pointing gun a woman, threatening to kill her with it, and telling her he had killed before; (4) almost 1 month after victim's murder, victim's mother received anonymous telephone call from person saying he did not mean to kill victim; (5) J's general access to weapons; (6) letter J. sent to girlfriend referring to victim and expressing desire to avenge her death; (7) girlfriend's testimony that J. talked about victim and referred to her as his "angel"; (8) that police investigated and obtained search warrant for J.; court concluded **trial court did not err in excluding** following evidence: (1) several other incidents reported by succession of J's girlfriends that J. had been threatening, violent, and abusive within several years of victim's murder, including holding knife to one girlfriend's neck; (2) J's school assignment wherein J. described the "perfect murder"; (3) J's drug and alcohol use; (4) J's parents' concerns about J's mental health; (5) contents and accompanying affidavit for search warrant for J.), *aff'd,* 226 Ariz. 281, 246 P.3d 632 (2011).

401.cr.123 In determining whether to admit evidence that another person may have committed the crime, the trial court should not analyze the admissibility of the evidence under Rule 404(b).

State v. Machado, 226 Ariz. 281, 246 P.3d 632, ¶¶ 10–16 (2011) (court followed reasoning from federal courts and other state courts).

401.cr.125 Even if evidence that another person may have committed the crime tends to create a reasonable doubt about the defendant's guilt and thus is relevant, the trial court may still exclude such evidence under Rule 403.

State v. Dann, 205 Ariz. 557, 74 P.3d 231, ¶¶ 30–36 (2003) (defendant sought to introduce evidence that, because victim took and sold drugs, some person involved in notoriously violent drug scene might have killed victim; trial court stated that any connection between drug trade and murders was "reach"; court stated its review would have been easier if trial court had stated its conclusion in terms of applicable legal standard, but because trial court discussion showed it understood need to determine relevance of evidence and thus was guided by applicable legal standard, court held that, whether trial court concluded evidence was not relevant under Rule 401 or tenuous and speculative nature of evidence caused it to fail Rule 403 test, trial court did not abuse discretion in precluding this evidence).

State v. Gibson, 202 Ariz. 321, 44 P.3d 1001, ¶¶ 12, 17 (2002) (court held admission of evidence that some other person committed crime is governed by Rules 401, 402, and 403, and included general discussion of Rule 403).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 41 (1998) (because no charges were ever brought against the other person for the murder defendant claimed was similar to the charged murder, interdiction of that evidence would have resulted in trial within trial, thus trial court did not abuse discretion in excluding it).

State v. Tankersley, 191 Ariz. 359, 956 P.2d 486, ¶ 42 (1998) (because the sexual assault that defendant claimed was similar was 10 years old, trial court did not abuse discretion in concluding it was too remote in time and not sufficiently similar).

401.cr.205 Evidence that a person tried to influence a witness or had some ulterior motive may be relevant.

State v. Styers, 177 Ariz. 104, 112–13, 865 P.2d 765, 773–74 (1993) (evidence supported instruction, and therefore trial court properly instructed jurors that, if they found that defendant attempted to persuade witness to testify falsely or tried to fabricate evidence, they may consider that as circumstance tending to show consciousness of guilt).

State v. Allen, 140 Ariz. 412, 413–14, 682 P.2d 417, 418–19 (1984) (court admitted in evidence letter defendant wrote to girlfriend in which he asked whether girlfriend and another would testify falsely for him; court held evidence was relevant and admissible, and it did not matter whether testimony was sought to be used for impeachment or substantive purposes).

State v. Robles, 135 Ariz. 92, 93–94, 659 P.2d 645, 646–47 (1983) (in opening statement, prosecutor told jurors that victim would testify that defendant told him to stab another witness, who was going to testify that defendant confessed to murder; court held evidence of defendant's threats against witness was admissible).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20–23 (Ct. App. 1998) (victim's mother testified that defendant's wife said to her, "If my husband spends one day in jail because of you guys, you're going to be dead"; court held threat was probative of wife's bias, and was properly admitted; court further held "Rule 608(b) neither blocks an inquiry about conduct which is probative of bias nor precludes introduction of extrinsic evidence to prove such conduct").

State v. Gertz, 186 Ariz. 38, 41–42, 918 P.2d 1056, 1059–60 (Ct. App. 1995) (defendant asked victim whether he was filing civil lawsuit against defendant, and victim said "we haven't talked about filing a lawsuit or anything"; after closing arguments but before jurors began deliberating, process server delivered summons and complaint naming defendant as defendant in civil damages suit brought by victim; defendant sought to reopen for limited purpose of informing that victim had in fact brought suit against defendant, but trial court denied request; court held evidence was relevant to show motive and bias and show have been admitted, and was not impeachment on collateral matter and thus was not precluded by Rule 608(b)).

State v. Updike, 151 Ariz. 433, 433–34, 728 P.2d 303, 303–04 (Ct. App. 1986) (defendant's statement to co-participant to "keep your mouth shut and nobody will get in trouble" was effort to get co-participant to assert privilege against self-incrimination in order to protect defendant, and was obstruction of justice and admission that defendant was conscious of guilt).

401.cr.270 Evidence of prior sexual conduct between the victim and persons other than the defendant is generally not admissible.

State v. Herrera, 226 Ariz. 59, 243 P.3d 1041, ¶¶ 29–33 (Ct. App. 2010) (defendant was charged with committing sexual acts on 14-year-old step-daughter; court held trial court did not abuse discretion in precluding evidence that victim had consensual sexual relationship with female friend and had sexual intercourse with boyfriend), *vacated,* 230 Ariz. 387, 285 P.3d 308 (2012).

401.cr.285 If the defendant raises a defense of mis-perception, and the victim is of such a young age or has been subjected to events that may have caused the victim to mis-perceive what happened, evidence of these other events is relevant.

State v. Lujan, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching victim's private parts, defendant was entitled to show that victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceive defendant's actions).

401.cr.290 Expert testimony about "child sexual abuse accommodation syndrome" (CSAAS) is relevant and admissible in a child molestation case.

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness testified about generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, response to abuse, and "script memory," described familiar patterns of disclosure by victims to others, and described common techniques used by perpetrators to keep victims from disclosing abuse to others).

401.cr.310 Expert testimony about "battered woman syndrome" is not admissible to show that defendant could not form the necessary intent to commit the crime charged.

State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant charged with child abuse for failure to seek treatment after her child was injured while in care of boyfriend; defendant wanted to introduce evidence that her condition as battered woman caused her to form "traumatic bond" with boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming necessary intent; court held this was merely another form of diminished capacity, which legislature has refused to adopt, thus evidence was not admissible).

401.cr.340 If a party offers an experiment or model as an attempted replication of the litigated event, the conditions in the experiment or the model must substantially match the circumstances surrounding that event; if the experiment or model is not a purported replication but is more in the nature of a demonstration, it is appropriately admitted if it fairly illustrates a disputed trait or characteristic.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 69–70 (2001) (defendant contended his brother committed murders and could have defeated electronic bracelet monitoring system; over weekend before trial, state conducted tests to see if it was possible to defeat electronic bracelet monitoring system used by defendant's brother; because state conducted tests under conditions

similar to those of defendant's brother, and because defendant had opportunity to question methodology of tests and meaning of results, evidence of testing was admissible).

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶¶ 6–7 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant kicked victim and then was asked to use chair to demonstrate; court held kicking of chairs was not purported replication and was instead more in nature of demonstration, thus conditions did not have to be similar and instead only had to illustrate fairly disputed trait or characteristic).

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 15–17 (2010) (although autopsy photographs of victim dead for 4 days showed skin slippage and discoloration, each photograph conveyed highly relevant evidence about crime: cause and manner of victim's death and her body's state of decomposition, and medical examiner used them to explain injuries and assist jurors in understanding his testimony; court held trial court did not abuse discretion in admitting photographs after expressly finding their probative value was not substantially outweighed by any prejudicial effect).

State v. Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 21–22 (2010) (defendant was charged with first-degree murder and child abuse as result of death of his girlfriend's daughter; defendant contended trial court erred in admitting autopsy photographs showing various internal injuries; court held photographs were relevant to prove cause of death and extent of abuse and to rebut defendant's argument that victim seemed fine after he beat her and his suggestion she died because of lack of prompt medical care).

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 29–31 (2010) (photographs depicted blood spatter and blood pools in relation to victim's body, and thus corroborated opinion of state's expert that person who slit victim's throat stood behind him).

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 51–53 (2010) (during aggravation phase, trial court admitted three autopsy photographs depicting close-ups of victim's neck wounds (cut jugular vein; completely severed carotid artery; victim's torso covered in dried blood and head tilted back exposing severed larynx); court held these were properly admitted to illustrate testimony of medical examiner).

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 34–38 (2009) (defendant contended trial court erred in admitting various photographs; because defendant in his opening brief specified his objection to only two photographs, court held defendant waived any argument for the other photographs; court noted that photograph of adult victim showed her broken arm, which medical testimony explained was defensive wound, and thus held photograph was relevant to issue of whether defendant committed first-degree murder; because jurors did not choose death sentence for killing of child victim, court held defendant was not prejudiced by admission of photograph showing body of child victim).

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 44–47 (2009) (defendant contended trial court denied him right to fair trial when it admitted autopsy photographs, which he claimed were gruesome; court held photographs were relevant because they gave jurors clear picture of temporal, spatial, and motivational relationship of three killings, thus trial court did not abuse discretion in admitting photographs).

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 123–127 (2008) (defendant challenged admission of autopsy photograph; court held photograph was relevant to assist jurors because fact and cause of death are always relevant in murder prosecution).

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶ 24 (2007) (state introduced photographs to establish that killing was heinous and depraved).

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 27–29 (2007) (photograph of Confederate flag used as window covering on van was relevant because victim's blood was on flag; photograph of van showing Confederate flag was relevant because killing took place in van; photograph of defendant, in which he was shirtless and showed tattoos, was relevant because it showed defendant's physical condition at time of murder and showed no visible injuries or defensive wounds; court noted probative value was minimal because defendant stipulated to existence of blood on flag, that murder took place in van, and that defendant had no injuries; court also noted prejudicial effect was minimal because defendant stipulated to blood on "Confederate flag taken from the rear side window" of defendant's van, and that it was not possible to read what tattoos said).

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 68–71 (2007) (photographs relevant because they provided information about time and manner of death or otherwise corroborated state's case).

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated that photographs of victim are relevant in murder case because fact and cause of death are always relevant in murder prosecution, and may also be relevant to show *corpus delicti,* to identify victim, to show fatal injury, to determine atrociousness of crime, to corroborate other witnesses, to illustrate other testimony, or to corroborate state's theory of crime).

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 3, 16–20 (2006) (defendant was upset at victim because victim had identified him to police; state's theory of case was that defendant went to victim's room, turned up volume on CD player, then shot victim in forehead, killing him, then as defendant was about to leave house, he went back into bedroom where victim's girlfriend was sleeping, and when she told him to get out, he shot her in head, killing her and her unborn child; defendant contended that, because he did not deny that murder took place, only that he was not the killer, photographs of victims were not relevant; court stated photographs of adults showed placement of victim's injuries and thus were relevant to corroborate testimony of state's witnesses, and although photograph of fetus was unsettling, it was relevant to fetal manslaughter offense and multiple homicides aggravating circumstance, thus trial court did not abuse discretion in admitting photographs).

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶ 40 (2005) (court stated that "any photograph of the deceased in any murder case is relevant because the fact and cause of death are always relevant in a murder prosecution").

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 37–42 (2005) (photograph of victim with knife inserted through ear and emerging through nose showed an attacker would have had great difficulty acting alone, and thus was relevant to rebut defendant's claim that he did not participate in killing).

State v. Phillips, 202 Ariz. 427, 46 P.3d 1048, ¶¶ 29–31 (2002) (African-American man and white or Hispanic man with bandana robbed bar while armed with handgun and sawed-off rifle; trial court admitted photograph of defendant holding two handguns and wearing bandana; because one gun in photograph matched description of gun used in robbery, photograph was relevant).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 67 (2002) (photograph (ex. 19) depicted what witness saw upon entering house; court found photographs were not gruesome or inflammatory, and stated photograph had little probative value and little prejudicial effect, so trial court did not abuse discretion in admitting photograph).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 68 (2002) (photograph (ex. 75) depicted what officer saw upon entering house; court found photographs were not inflammatory or gruesome, and held that, to extent officer testified he did not remember body being in position depicted in photograph, that went to weight of photograph and not its admissibility).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 69 (2002) (photographs (ex. 32–34) were of victim during autopsy; defendant conceded photographs were relevant, but claimed they were unduly inflammatory; court found photographs were not gruesome or inflammatory).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of victim's body were relevant, although noting that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 43–44 (1998) (photographs of crime scene corroborated, explained, and illustrated testimony about crime scene; autopsy photographs corroborated, explained, and illustrated testimony of medical examiner).

State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) (photograph of body was relevant because it corroborated defendant's detailed account of how he murdered victim).

State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (photographs of victim's injuries corroborated testimony of state's key witness).

State v. Lee(II), 189 Ariz. 608, 944 P.2d 1222 (1997) (four autopsy photographs and three blood-spatter photographs were relevant to show location, size, and shape of wounds, and sequence of shots, and were not unfairly prejudicial).

State v. Hughes, 189 Ariz. 62, 938 P.2d 457 (1997) (photograph was relevant because it showed placement of stick within noose, as well as length of the rope, and one issue was whether victim had been bound at hands or feet and whether stick was used as torture device).

State v. Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (videotape showed walk-through of victim's entire house and illustrated testimony of officer, thus it was relevant).

State v. Wagner, 194 Ariz. 1, 976 P.2d 250, ¶¶ 40–41 (Ct. App. 1998), *vac'd in part & aff'd in part,* 194 Ariz. 310, 982 P.2d 270 (1999) (court agreed with trial court that three photographs showing victim's (1) face with traces of blood and assorted injuries, (2) chest wound with gunpowder residue, and (3) shoulder and ear with powder burn marks were relevant because they corroborated witness's testimony that defendant struck victim before shooting her and helped explain medical examiner's testimony about powder burn marks).

401.cr.360 The fact that there is no dispute about certain elements or that the defendant is willing to stipulate to them, such as the identity of the victim, or the time, mode, manner, and cause of the injury, does not make a photograph inadmissible.

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 24–25 (2007) (defendant contended trial court should not have admitted photographs because he was willing to stipulate to facts of murder; court noted state was still required to prove every element of crime, and this burden of proof was not relieved by defendant's tactical decision not to contest certain elements; moreover, although defendant was willing to admit to having killed victim, he did not offer to stipulate killing was heinous and depraved).

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated, even if defendant does not contest certain issues, photographs are still admissible if relevant because burden to prove every element of offense is not relieved by defendant's tactical decision not to contest element of offense).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 60–62 (2004) (defendant contended trial court abused discretion in admitting autopsy photographs because identity and extent of victims' injuries were not contested; court stated that fact and cause of death is always relevant in murder case; court held photographs were relevant to time and manner of victims' death, thus trial court did not abuse discretion in admitting photographs).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 65–66 (2002) (court stated that, because state must carry its burden of proof on uncontested issues as well as contested one, fact that photographs were probative only of matters not in dispute did not make them irrelevant).

State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (photographs of victim's injuries corroborated testimony of state's key witness; fact that defendant did not dispute cause of death did not make them any less relevant).

State v. Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (defendant's willingness to stipulate to identification of victim did not make autopsy photograph irrelevant because it showed how victim was killed and that shot was fired from approximately 5 inches away).

401.cr.365 If a photograph has little bearing on any expressly or impliedly contested issue, or if a photograph is merely duplicative to other photographs, its relevance may be limited, and thus if that photograph is prejudicial, its probative value may be substantially outweighed by the danger of unfair prejudice.

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 16–20 (2006) (court stated that photographs must not be introduced for sole purpose of inflaming jurors).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456, ¶¶ 63–64 (2004) (defendant contended trial court abused discretion in admitting photographs and videotape of crime scene because he did not contest identity of victims and fact that murders had occurred; court held probative value was minimal and photographs and videotape were highly inflammatory, thus trial court abused discretion in admitting them, but any error was harmless in light of other evidence).

State v. Jones, 203 Ariz. 1, 49 P.3d 273, ¶¶ 28–33 (2002) (in trial for murder of 12-year-old victim, trial court admitted following photographs of victim: close-up of buttocks showing injuries to anus and hemorrhaging; lower half of face and torso showing lacerations, puncture wounds, and training bra pushed over chest; close-up of torso showing lacerations and puncture wounds

to middle chest and throat; torso with ruler showing scale of wounds; close-up of pelvic region showing vaginal injury and hemorrhaging; shaved head showing multiple deep wounds to frontal lobe; skull with skin removed showing large frontal impact hole and bone fragments; because defendant did not challenge manner of death or injuries and only defense was identity of perpetrator, court stated that, although photographs might be technically relevant, there was nothing in them that could not have been made clear through testimony and diagrams, thus photographs were cumulative; because of other evidence of guilt and jurors' acquittal on one count, court held that any error would be harmless, but stated that cumulative, non-essential, and gruesome photographs should not be admitted in evidence).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 21–25 (2001) (court stated photographs of body were relevant; court noted that, when defendant does not contest certain issues, probative value may be minimal, but held trial court did not err in admitting Exhibits 42–45).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 25–27 (2001) (court noted prosecutor argued photographs were relevant because they showed angles and depths of penetrating wounds, but prosecutor never questioned any witness about angles and depths of wounds; court concluded that photographs met bare minimum standard of relevance, but that probative value was substantially outweighed by danger of unfair prejudice, thus trial court should have excluded Exhibits 46–47, but found any error to be harmless).

State v. Anderson, 197 Ariz. 314, 4 P.3d 369, ¶ 30 (2000) (court concluded several photographs were cumulative to other less inflammatory photographs).

State v. Doerr, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 29, 31–32 (1998) (court held that enlarged photograph of victim when alive was not relevant, and there was danger such photograph would cause sympathy for victim, but concluded admission of photograph did not materially affect verdict in light of overwhelming physical evidence).

State v. Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (photographs of victim after decomposing for 3 days and showing insect activity had little if any probative value, thus trial court erred in not finding that probative value was substantially outweighed by prejudicial effect).

401.cr.380 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 68–69 (2001) (witness had been willing to take polygraph test, and defendant sought to question officers about their decision not to give witness polygraph test, contending this showed officers did not consider witness to be reliable; court held any testimony about polygraph tests was inadmissible, and declined invitation to revisit what it considered was settled area of law).

401.cr.390 Although certain evidence may initially be inadmissible, if a party through questioning "opens the door" to this area and introduces testimony upon which the evidence has a bearing, the evidence becomes relevant and therefore becomes admissible.

State v. Tovar, 187 Ariz. 391, 930 P.2d 468 (Ct. App. 1996) (although state's questioning about handgun was irrelevant, defendant did not object, and when defendant gave false answer, he opened the door to evidence that otherwise would have been inadmissible).

State v. Paxton, 186 Ariz. 580, 925 P.2d 721 (Ct. App. 1996) (because defendant presented evidence in his case that made witness's testimony relevant, trial court properly allowed witness who had been precluded from testifying on direct to testify on rebuttal).

State v. DePiano, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995) (when defendant asked officer whether he would agree that certain portions of note were subject to different interpretations, it opened the door to admission of opinions by several lay witnesses of their interpretations of note), *vacated on other grounds,* 187 Ariz. 27, 926 P.2d 494 (1996).

401.cr.400 The "relevance" discussed in *Booth v. Maryland* is different from that in the rules of evidence, and is instead a constitutional concept that considers whether information that may bear upon a capital sentencing decision creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors.

Lynn v. Reinstein (Glassel), 205 Ariz. 186, 68 P.3d 412, ¶ 13, n.5 (2003) (husband of murder victim sought to tell jurors he thought defendant should receive life in prison; court held that victim in capital case had right to tell jurors how defendant's crime affected victim's life, but did not have right to tell jurors what sentence victim thought should be imposed).

401.cr.410 Although the preferred method of proving a prior conviction for sentence enhancement purposes is a certified document bearing the defendant's fingerprints, courts may consider other kinds of evidence as well, such as a certified copy of a record abstract ("pen pack") from the Arizona Department of Corrections.

State v. [Van] Adams, 194 Ariz. 408, 984 P.2d 16, ¶¶ 35–37 (1999) (state presented certified copy of California Disposition of Arrest and Court Action that showed "Adams, James Van," "dob 1/30/64," had been convicted of assault with intent to commit rape; even though California material did not include photograph and fingerprints, because name, date of birth, physical description, and social security number in California material matched those items for defendant, state presented sufficient evidence for trial court to conclude that defendant had prior conviction).

State v. Miller, 215 Ariz. 40, 156 P.3d 1145, ¶¶ 4, 10–13 (Ct. App. 2007) (at aggravation phase of trial, state called prosecutor who testified that she had previously prosecuted defendant and he was convicted for four separate felony offenses; because defendant did not object, court reviewed for fundamental error only; court held some form of documentary evidence was still required, thus agreed that trial court erred in permitting jurors to find conviction based only on witness's testimony, but defendant failed to prove prejudice).

State v. Robles, 213 Ariz. 268, 141 P.3d 748, ¶¶ 3, 11–17 (Ct. App. 2006) (state relied upon certified copy of record abstract ("pen pack") from Arizona Department of Corrections to prove defendant's prior convictions).

Impeachment Cases

401.imp.010 Evidence that tests, sustains, or impeaches a witness's credibility or character is admissible for impeachment or rehabilitation purposes.

Salt River Project v. Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant's managing member testified about fair market value of property; plaintiff sought to impeach that testimony with statements in defendant's tax protest that full cash value of property was certain figure, which was less than figure given in condemnation action; court held that land owner's prior statements of value for tax purposes may be, but are not always, admissible in condemnation action; court noted that persons from company that prepared tax protest did not testify at condemnation trial, and person who testified at condemnation trial did not participate in preparing tax protest, thus trial court did not abuse discretion in precluding statements from tax protest).

State v. Johnson, 212 Ariz. 425, 133 P.3d 735, ¶¶ 36–40 (2006) (although parts of videotape of defendant's statement did not reflect well on defendant because of his use of profanity and references to unrelated criminal conduct, it was relevant because state's expert based opinion of personality disorder in part on videotape, and was helpful to jurors because it showed defendant's histrionic traits, and served to rebut defendant's expert's testimony that defendant was not faking his symptoms, thus trial court did not abuse discretion in admitting this evidence).

Hernandez v. State, 203 Ariz. 196, 52 P.3d 765, ¶¶ 5, 13–17 (2002) (in notice of claim letter required by statute, plaintiff's description of physical characteristics of area was incorrect; prior to trial, parties stipulated to actual physical characteristics of area, and plaintiff testified at trial, giving accurate description of physical characteristics of area; court held trial court properly permitted defendant to impeach plaintiff's accurate trial testimony with his incorrect description of physical characteristics of area contained in claim letter).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 50–51 (2002) (hearing defendant's actual words and his demeanor would assist jurors in determining credibility, so audiotape had probative value).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 73–75 (2001) (state called supervisor of AzDOC home arrest program to rebut testimony of defendant's brother's parole officer, who testified how electronic bracelet monitoring system could be defeated; court admitted evidence of lawsuit filed against AzDOC by victims of defendant's crimes alleging negligent supervision of defendant, other participant in crimes, and defendant's brother, but precluded defendant from questioning supervisor about lawsuit because, in pre-trial interview, supervisor denied any knowledge of lawsuit; court held trial court should have allowed questioning of supervisor to explore any motive to fabricate, but held any error was harmless because nothing suggested supervisor had any knowledge of lawsuit).

State v. Ramsey, 211 Ariz. 529, 124 P.3d 756, ¶¶ 31–34 (Ct. App. 2005) (defendant was charged with continuous sexual abuse of child, which requires proof of three or more acts of sexual conduct with minor, sexual assault, or molestation of child under 14 years of age over period of 3 months or more; evidence showed defendant touched 12-year-old daughter's breasts, vagina, and buttocks numerous times over 22-month period; defendant contended evidence that he took daughter to adult store and bought her vibrator and bottle of lubricant was not relevant; court held this evidence was probative of daughter's credibility and supported her testimony, thus evidence was relevant).

State v. Rienhardt, 190 Ariz. 579, 951 P.2d 454 (1997) (defendant elicited inconsistent statement from state's witness on cross-examination; on re-direct trial court allowed state to introduce prior consistent statements; court held such statements were relevant by definition).

State v. Livingston, 206 Ariz. 145, 75 P.3d 1103, ¶ 13 (Ct. App. 2003) (while driving on curved road, defendant allowed right side tires to cross white shoulder line on one occasion and then corrected, bringing vehicle back within lane; trial court held this action did not violate statute that requires person to drive vehicle as nearly as practicable entirely within single lane; state contended trial court erred when it allowed inquiry into, and commented upon, officer's subjective motive in making stop; court agreed that officer's subjective motive was not relevant to whether officer had legally justifiable grounds to stop defendant's vehicle, but held officer's ulterior motive for stop would be relevant to officer's credibility on threshold question of whether officer actually had witnessed traffic violation).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 15–17 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as nonparties at fault; because plaintiff's trial strategy was to minimize radiologist's fault in order to place more blame on TMC/HSA, plaintiff's factual allegations contained in complaint delineating radiologist's negligence were relevant and admissible against plaintiff).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 8–9 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

401.imp.013 If evidence does not test, sustain, or impeach a witness's credibility or character, it is not admissible for impeachment or rehabilitation purposes.

Salt River Project v. Miller Park LLC, 218 Ariz. 246, 183 P.3d 497, ¶¶ 23–25 (2008) (in condemnation action, defendant's managing member testified about fair market value of property; plaintiff sought to impeach that testimony with statements in defendant's tax protest that full cash value of property was certain figure, which was less than figure given in condemnation action; court held that land owner's prior statements of value for tax purposes may be, but are not always, admissible in condemnation action; court noted that persons from company that prepared tax protest did not testify at condemnation trial, and person who testified at condemnation trial did not participate in preparing tax protest, thus trial court did not abuse discretion in precluding statements from tax protest).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 61 (2001) (witness was arrested for drug dealing 2 days after testifying; arrest could not have affected witness's testimony or given him motive to fabricate, thus trial court did not abuse discretion in precluding this evidence).

State v. Abdi, 226 Ariz. 361, 248 P.3d 209, ¶¶ 21–25 (Ct. App. 2011) (defendant claimed victim's immigration status would be in jeopardy if he had been aggressor, thus evidence of victim's immigration was relevant; court held defendant made no showing victim's immigration status would be in jeopardy; thus evidence was not relevant).

401.imp.015 A prior inconsistent statement may be used for substantive as well as for impeachment purposes.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant introduced statements from two inmates, who claimed codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated Confrontation Clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

401.imp.017 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

401.imp.020 Evidence showing that the witness's mental condition may have had an effect on the witness's ability to perceive, remember, or relate is admissible for impeachment and rehabilitation purposes.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion in precluding this evidence).

State v. Orantez, 183 Ariz. 218, 222–23, 902 P.2d 824, 828–29 (1995) (because evidence of intoxication at time of observation is admissible to attack witness's ability to perceive, remember, and relate, trial court erred in denying defendant's motion for new trial based on newly-discovered evidence that victim was using drugs at time of assault).

State v. Zuck, 134 Ariz. 509, 513–14, 658 P.2d 162, 166–67 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime).

401.imp.030 Before a party may introduce evidence about the witness's mental condition or drug use in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition or drug use did have an effect on the witness's ability to perceive, remember, or relate.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion in precluding this evidence).

State v. Soto-Fong, 187 Ariz. 186, 197–98, 928 P.2d 610, 621–22 (1996) (because defendant's offer of proof failed to show how officer's terminal illness, use of prescription medicine, or mood in any way affected his testimony, trial court properly precluded this evidence).

State v. Dumaine, 162 Ariz. 392, 397–98, 406, 783 P.2d 1184, 1189–90, 1198 (1989) (defendant presented insufficient evidence to show mental condition affected witness's ability to perceive, remember, and relate, thus prosecutor did not commit discovery violation by failing to disclose witness's mental condition).

State v. Walton, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (state's witness testified about admission defendant had made; defendant sought to introduce evidence of witness's history of drug use, but made no offer of proof beyond bare speculation; state sought to exclude evidence of witness's drug use beyond use at time he heard defendant's admission; court stated trial court does not abuse discretion when proponent fails to make offer of proof that witness's perception or memory was affected by condition; court held that, because defendant's offer of proof failed to show drug use did impair witness's memory or perception, trial court did not abuse discretion in excluding evidence).

State v. Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 662 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime; court stated, "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

Mulhern v. City of Scottsdale, 165 Ariz. 395, 397–98, 799 P.2d 15, 17–18 (Ct. App. 1990) (trial court granted defendant's motion to preclude evidence of officer's drug and alcohol use; because plaintiff did not offer any evidence that officer was under influence of alcohol or drugs at time of shooting, trial court properly precluded evidence of officer's use of alcohol and drugs).

401.imp.070 Specific instances of the witness's conduct or a party's conduct are admissible if they show bias, prejudice, interest, or corruption on the part of the witness, or how they may have affected the witness's testimony.

American Fam. Mut. Ins. v. Grant, 222 Ariz. 507, 217 P.3d 1212, ¶¶ 2–30 (Ct. App. 2009) (respondent made claim with petitioner for injuries from automobile collision; petitioner retained

orthopedic surgeon (Dr. Zoltan), who opined that respondent's injury was result of preexisting degenerative joint disease, so petitioner denied claim; respondent sued petitioner and sought discovery involving financial arrangements between petitioner and Zoltan; trial court ordered Zoltan to provide various items of information covering last 8 years; petitioner conceded that respondent may take Zoltan's deposition to demonstrate any bias, including general inquiry into his involvement in case, who hired him, his credentials, compensation received for this case, approximate number of examinations and record reviews he performed in last year, his dealings generally with petitioner and their law firm, approximate amount received for expert services in last year, approximate percentage of practice devoted to litigation-based examinations and record reviews, and his knowledge of other cases where he testified at depositions or trials during last 4 years; court vacated challenged portions of trial court's discovery order and remanded so that trial court could assess whether respondent had explored less intrusive discovery, and if so, whether respondent could demonstrate good cause for any more expanded inquires).

State v. Uriarte, 194 Ariz. 275, 981 P.2d 575, ¶¶ 20–21 (Ct. App. 1998) (defendant was charged with child molestation, sexual conduct with minor, and public sexual indecency involving his 12-year-old sister-in-law; defendant's wife testified; trial court did not abuse discretion in admitting evidence that defendant's wife threatened victim and victim's mother with death if defendant was convicted).

Sheppard v. Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶¶ 42, 44 (Ct. App. 1998) (party is entitled to introduce evidence that expert witness has done certain amount of work for insurance companies).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because letter could have shown witness's bias and desire to alter testimony, trial court erred in limiting cross-examination).

401.imp.075 A party may question the other party's expert witness about the extent of compensation the witness has received testifying as an expert witness.

State v. Manuel, 229 Ariz. 1, 270 P.3d 828, ¶¶ 28–29 (Dec. 21, 2011) (on cross-examination, defense mitigation expert testified he and wife earned about $200–300,000 annually from work on capital cases, that total income was about $400,000, and gross income was about $650,000 from both capital and non-capital cases, and acknowledged prosecution had never asked him to testify for state in capital case).

401.imp.080 Specific instances of a witness's conduct are admissible if they are inconsistent with the witness's testimony.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because defendant paid $2 million to expert witness's firm and thus expert witness had stake in litigation, plaintiff was properly allowed to refer to expert witness as defendant's "$2 million man").

401.imp.085 Evidence is relevant and thus admissible if it is inconsistent with the witness's testimony or prior statements, and for a statement to be inconsistent, it must directly, substantially, and materially contradict the testimony in issue.

State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (evidence about shoe prints was relevant because it tended to show defendant may have been in woman's bedroom and thus showed that defendant may have lied about extent of his involvement in the murder and burglary).

401.imp.087 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v. Canion, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v. Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

401.imp.090 Evidence that impeaches on a collateral matter is irrelevant and inadmissible.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 58–59 (2001) (because it appeared witness's allegedly threatening statements to sister-in-law related to alimony dispute with witness's brother and not to her testifying at defendant's trial, trial court did not abuse discretion in precluding these statements).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 60 (2001) (because witness's arrest for drug dealing 2 days after testifying was not inconsistent with witness's testimony that he had not dealt drugs while in prison, this evidence was collateral, thus trial court did not abuse discretion in precluding this evidence).

401.imp.110 A party may not impeach a witness by implication, with facts that are not true, with facts that the party would not be able to prove, or by vague or speculative matters.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 70–71 (2001) (defendant sought to cross-examine state's witness about another state's witness's reputation as "braggart" and "boaster"; court held proposed testimony was vague, speculative, and immaterial, thus trial court did not err in precluding that testimony).